

IN THE SUPREME COURT OF THE STATE OF MONTANA  
DA-13-0536

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MARTIN MULIPA IOSEFO

Defendant and Appellant,

v.

CITY OF MISSOULA

Plaintiff and Appellee.

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APPELLANT'S REPLY BRIEF

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On Appeal from the Montana Fourth Judicial District, Missoula County  
Cause No. DC-13-92, Honorable Edward Mclean

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## **STATEMENT OF THE FACTS**

Iosefo incorporates his statement of the facts from his Opening Brief and disputes the statement of facts contained in the State's Response Brief in relying on one "fact" repeated twice by the State in its Brief. Specifically, the State contends "[a]fter the city police officers arrived, the driver, Martin Iosefo (Iosefo), was arrested for aggravated DUI, unlawful breath test refusal, and careless driving." *See Br. of App.* p. 1 and p. 5 (March 24, 2013). This statement is untrue. Iosefo was not arrested "after" police arrived; instead, he was arrested *prior* to police arriving by out-of-jurisdiction peace officer Mark Fiorentino. Iosefo was arrested when Fiorentino threatened to "put [Iosefo] at gunpoint" at least twice, or when Fiorentino attempted to place Iosefo in handcuffs. *911 Call*, at 0:44 – 0:59; *January 4, 2013 Hr'g*, at 4:05:15-4:05:30.

## **ARGUMENT**

### **1) State concedes that Fiorentino's mere suspicion of Iosefo's impairment results in suppression of Iosefo's arrest.**

Constrained by the district court's finding that Fiorentino had mere suspicion of impairment, the State argues that the district court reached the right result for the wrong reason.<sup>1</sup> Mere suspicion, whether by a private citizen or by law enforcement is never sufficient for arrest. Mont. Code Ann. §§ 46-6-502, 46-6-311. Even as a

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<sup>1</sup> The Municipal Court also found that the State conceded Iosefo's arrest by Fiorentino. (Appellee's App#1 p.3)

private citizen, regardless of his background as an off duty police officer, Fiorentino had no basis to detain Iosefo in order to conduct, or have law enforcement conduct, an investigation to determine the existence of probable cause. In the absence of probable cause, Fiorentino lacked the authority to arrest.

Here the district court has articulated Iosefo's very complaint: Fiorentino only had **suspicion**, not probable cause, concerning Iosefo. Thus according to the State seeking refuge in any port, the district court got the decision right but for the wrong reason. Iosefo's very point, however, is that both the record and the district court show that Fiorentino possessed mere suspicion before arrest. No private citizen is authorized to stop a person for suspicious driving.

**2) Focusing on the Municipal Court's Ruling and Findings results in the firm conviction that a mistake has been made.**

Recognizing that the district court ruling that Fiorentino only had suspicion before arresting Iosefo, the State changes its argument to "...focus primarily on the municipal court's ruling..." in a futile attempt to salvage a finding of probable cause. (Appellee Brf. p. 9, ¶ 1). Nevertheless, examination of the municipal court's ruling does not show that Fiorentino possessed probable cause any more so than the district court's ruling.

Describing the central facts of Iosefo's arrest, the municipal court noted that the River City Roots festival was held August 25-26, 2012; that yellow tape and barricades were placed to cordon off the area; that Iosefo was seen driving through

the tape and striking a barrier; upon the striking the barrier, Fiorentino called 911; and, Iosefo was uncooperative whereupon the arrest was effected. (Appellee's App. # 1, p .1).

An arrest comprises a three part test: 1) authority to arrest; 2) assertion of that authority to arrest; and 3) restraint. *State v. Widenhoffer*, 286 Mont. 341, 347, 950 P.2d 1383, 1386 (1997). Physical restraint is not necessary for an arrest. *Id.* The standard for an arrest when there is not a physical restraint of the defendant is whether a reasonable person, innocent of any crime, would have felt free to walk away under the circumstances. This standard drops any technical requirements for an arrest and the concept of restraint, and instead looks upon all the facts and circumstances of each case. *Id.* Oral commands are sufficient to arrest a person. *Id.* at 348, P.2d at 1387. Restraint may occur "by using or threatening to use physical force." Mont. Code Ann. § 45-5-302; see also § 45-5-201(d).

In this case, determining the moment of arrest becomes the critical consideration for the Court. The striking of the barrier, and breach of yellow tape by a driver are the central facts of arrest, but these facts do not constitute probable cause for arrest. The plain meaning of the statute mandates *two separate* elements to a private citizen arrest 1) probable cause; *and* 2) circumstances requiring immediate arrest. In fact, the breach of the yellow tape and impact with the barrier merely create suspicion. In other words, probable cause stands on its own,



separate and apart from the circumstances requiring immediate arrest as required by statute. Merging these two statutorily distinct elements raises the specter of vigilantism as noted in the Appellant's opening brief. Under the State's interpretation, the private citizen is left to guess when observed behavior requires confrontation. Under the state's interpretation, private citizens become empowered to rely on "disobedience" to commands as a fact permitting arrest.

**3) Fiorentino did not possess personal knowledge of any "impairment" in Iosefo's driving**

Attempting to shift the burden on to Defendant, the State implies that Iosefo must demonstrate that he was sober, rather than Fiorentino showing personal knowledge of impairment. (Appellee Brf. p. 12, ¶ 2). Central to the entire line of cases on probable cause is the personal knowledge of the arresting person. *State v. Ribera* (1979), 183 Mont. 1, 6, 597 P.2d 1164, 1167 (citizen informant's tip was not sufficient to establish probable cause to arrest the defendant where the citizen's information was based on observations made by a third party rather than on his personal knowledge); *State v. Ellington*, 2006 MT 219, ¶ 16, 333 Mont. 411, 143 P.3d 119 (probable cause exists where the facts and circumstances within an officer's personal knowledge prove sufficient to warrant a reasonable person to believe that someone is committing or has committed an offense); *State v. Van Dort*, 2003 MT 104, ¶ 19, 315 Mont. 303, 68 P.3d 728 (probable cause is evaluated in the light of a police officer's knowledge, and all the relevant circumstances.



Although probable cause does not require evidence sufficient to prove a person's guilt, the standard involves something more than an officer's mere suspicion of criminal activity). (Citation omitted). Yet when personal knowledge is denied as in this case, the State blames the arrestee for not proving his innocence. When asked whether he believed Iosefo was drunk, Fiorentino relayed to dispatch that “[u]m, I can’t tell.” *Order re: Municipal Appeal*, p.4:22-23. Although two lower courts never presumed that Iosefo bore the burden of countering Fiorentino’s personal state of mind, the State now requests that this Court do so. The evidence that Fiorentino did not possess personal knowledge that a crime was or had been committed remains un-contradicted. Fiorentino only possessed suspicion, not probable cause.

**4) The State raises a new issue on appeal by arguing for the first time, the totality of the circumstances provided Fiorentino with probable cause.**

Although presented with two opportunities before the lower courts, the State now asserts for the first time on appeal that the “totality of circumstances” demonstrates the existence of probable cause. (Appellee Brf. p. 12, ¶ 3). Arguments argued for the first time on appeal will be rejected. *State v. Adgerson*, 2003 MT 284, ¶ 12, 318 Mont. 22, 78 P.3d 850.

Assuming, however, this Court chooses to entertain the State’s new argument on appeal, the facts establishing probable cause still remains non-existent. According to the State, the “circumstances of the events” included Iosefo ignoring commands. (Appellee Brf. p. 12, ¶ 3). When did Montana make obedience to a private citizen’s

commands an element of probable cause? Assuming *arguendo*, that Iosefo was argumentative with Fiorentino (a fact not found in the record), so what? An argument or disagreement is not an element of probable cause. Aside from striking the barrier, there are no facts of probable case. The mere striking of the barrier and refusal to obey commands, especially those issued under threat of force, from a private citizen never reaches the point of probable cause.

The fundamental fact of probable cause was not the breach of the yellow tape, but Iosefo's refusal to comply with a private citizen command when Fiorentino never identified himself as anything but a private citizen. Ordinary Montana citizens still enjoy the freedom to ignore one another's verbal commands and not risk arrest.

**5) The State's reliance upon *McDole*, *Schubert*, *Sunford*, and *Hendrickson* is misplaced because of material factual differences between those cases and Iosefo's.**

The State's argument on pre-*Updegraff* cases must be viewed in light of *stare decisis* created by *Updegraff*. *State v. Updegraff*, 2011 MT 321, 363 Mont. 123, 267 P.3d 28. Specifically, *Updegraff* clarified that although the out-of-jurisdiction peace officers in *McDole*, *Schubert*, *Sunford*, and *Hendrickson* never ceased to "be" peace officers, they were limited by Mont. Code Ann. § 46-6-502(1) (Private citizen's arrest statute) when "acting" under its authority.

The facts presented in the instant case differ from *McDole* inasmuch as the defendant in *McDole* completely left the scene of the accident. *State v. McDole*, 286

Mont 169, 173, 734 P.2d 683, 685 (1987). For reasons discussed below, this makes *McDole* materially different than Iosefo's case because Iosefo never left the parking garage despite Fiorentino's armed threats. *Municipal Court Opinion and Order*, p.2. Likewise, Iosefo's case is factually distinct from *Hendrickson* because the on duty, out-of-jurisdiction officer received permission from local dispatch that an investigatory stop of the defendant's vehicle was permissible. *State v. Hendrickson*, 283 Mont. 105, 107, 939 P.2d 985, 986 (1997) (Overruled on other grounds). Here, Fiorentino never received permission from Missoula dispatch to initiate a traffic stop. Material facts in this case are also distinguishable from *Schubert* because the private citizen in *Schubert* observed the defendant "repeatedly" swerve across both lanes of traffic and that the defendant was "all over the road." *State v. Schubert*, 2010 MT 255, ¶¶ 5-6, 358 Mont. 286, 244 P.3d 748. Unlike in *Schubert*, Iosefo's driving was not excessively dangerous to others; he merely struck a temporarily erected barricade. Finally, *Sundford* is inapplicable because the Court determined the citizen's arrest was legal based upon the private citizen's noting that the defendant "smelled of alcohol, swayed back and forth and slurred his speech." *State v. Sundford*, 244 Mont. 411, 415, 796 P.2d 1084, 1086 (1990). In the present case, Fiorentino did not confirm DUI indicators before he arrested Iosefo. *911 Transcript* at 00:54-00:55. Fiorentino lacked the personal knowledge to conclude Iosefo was drunk. *Id.*



As noted in Iosefo's Opening Brief, many legitimate causes may have excused Iosefo's erratic driving besides criminal behavior. Certainly, Fiorentino may have had cause to perform a welfare check, but he did not; instead, he went directly to arrest. Fiorentino exceeded his authority to arrest when he concluded Iosefo's erratic driving, without more facts, empowered him to effectuate an arrest. *State v. Waite*, 2006 MT 216, ¶ 13, 333 Mont. 365, 143 P.3d 116. (Erratic driving can constitute the basis for *particularized suspicion* to stop a vehicle). (Emphasis added).

**6) Substantial credible evidence does not exist to support a finding of probable cause *before* Fiorentino made a private citizen arrest.**

As previously stated, the moment of arrest becomes the critical consideration for the Court because, although Iosefo's behavior *after* his arrest might have generated additional facts showing probable cause, mere particularized suspicion existed *before* his arrest. According to the State, Fiorentino's behavior was appropriate because "[b]ased on Iosefo's driving and erratic behaviors, Fiorentino was concerned for the safety of Iosefo and the public, and that was the reason he was trying to detain him." *Brf. of App.*, p.4. While understandably laudable, Fiorentino's concerns do not add to probable cause, his concerns relate to the second element of the statute as a circumstance that requires immediate arrest.



**a) What Fiorentino knew before the arrest.**

Probable cause exists when the facts and circumstances within the personal knowledge of the person making the arrest are sufficient to warrant a reasonable person to believe that the suspect has committed an offense. *Jess v. State Dept. of Justice, MVD* (1992), 255 Mont. 254, 261, 841 P.2d 1137, 1141. An in-jurisdiction peace officer may not make an arrest, even upon probable cause, for a non-jailable offense, unless exigent circumstances exist. *State v. Bauer*, 2001 MT 248, ¶ 32, 307 Mont. 105, 36 P.3d 892. A private citizen is permitted to make an arrest founded upon probable cause and when existing circumstances require the person's immediate arrest. § 46-5-502(1).

Here, the facts personally known to Fiorentino after twice threatening to put Iosefo at gunpoint, are insufficient to establish probable cause. *911 Call* at 0:44 – 0:59; *Hr'g*, at 4:05:15-4:05:30. The **entirety** of Fiorentino's personally known facts is summarized in the State's brief:

Iosefo [drove] through the exit of the parking garage through yellow caution tape that secured the pedestrian area; he was traveling the wrong way out of the garage. (Citations omitted). Iosefo then attempted to turn his vehicle and collided with a heavy plastic barricade; the impact moved the barricade and caused damage to his vehicle. (Citations omitted). ....As Fiorentino approached Iosefo's vehicle, Iosefo continued to try and drive through the area. (Citations omitted). After he finally stopped, Fiorentino told Iosefo to remain in his vehicle until the police arrive, but Iosefo ignored his verbal commands and exited the vehicle and walked away. (Citations omitted). *Brf. of App.*, pp. 2-3.

The State does not include in the facts that Fiorentino's "verbal commands" were threats to "put [Iosefo] at gunpoint" and a physical attempt to handcuff Iosefo. *911 Call* at 0:44 – 0:59; *Hr'g*, at 4:05:15-4:05:30. By then was Iosefo was, in fact arrested. In other words, Fiorentino attempted to arrest Iosefo on nothing more than the impact with the barrier described as erratic driving.

Nevertheless, proceeding through caution tape, striking a traffic barrier, and continuing to drive does not give a reasonable person belief that a crime had been committed, let alone a jailable crime. *State v. Waite*, 2006 MT 216, ¶ 13, 333 Mont. 365, 143 P.3d 116. Stated another way, erratic driving gives rise to mere particularized suspicion, not probable cause. *Id.*

Although Fiorentino does not lose his training and experience as a peace officer when moonlighting as a security guard, Iosefo has no way of knowing that Fiorentino is an out-of-jurisdiction peace officer. No evidence exists that Fiorentino announced that he was a peace officer. *See 911 Transcript; Hearing Transcript*. From Iosefo's perspective, a reasonable person would attempt to get away from an armed person who was attempting to place handcuffs. In other words, Fiorentino's training and experience, while not forgotten by Fiorentino, should not be imputed to Iosefo then used to justify the arrest. Once again, the weakness of the State's position encourages a return to vigilantism.

From another perspective, since Montana has the rule that an off-duty out of jurisdiction peace officer does not lose his training and experience. If non-compliance becomes an element of probable cause, then private citizens should be made to announce the authority under which such authority for arrest is exercised, including the status as an off-duty police officer. Yet Fiorentino chose not to identify himself and his experience to Iosefo before arrest.

Fiorentino only possessed particularized suspicion, based upon erratic driving, before he “detained” Iosefo. Because private citizens do not possess investigatory stop authority, Fiorentino’s decision to arrest Iosefo for erratic driving should be suppressed. Mont. Code Ann. § 46-5-401(1); *Waite* at ¶ 13.

**b) Fiorentino’s behavior, although understandable, was an impermissible arrest and should be suppressed.**

In Montana, peace officers are permitted to make an “investigatory stop...to determine whether to arrest the person....in circumstances that create a particularized suspicion that the person...has committed, is committing, or is about to commit an offense.” Mont. Code Ann. § 46-5-401(1). Private citizens are not afforded the same authority. *Id.* Of course, an out-of-jurisdiction peace officer, like Fiorentino, does “not suddenly forget all [his] training and experience” when he is out-of-jurisdiction. *Updegraff*, at ¶¶ 48, 52. Fiorentino’s instinct was understandable. He believed Iosefo was or had committed a crime, and Fiorentino reacted, as his training had taught him, to “attempt” and to “try” to “detain” Iosefo. *See Brf. of App.*, pp. 3-4.



However, since Fiorentino was out-of-jurisdiction and acting under the authority of § 46-6-502(1) (Citizen's arrest statute), he did not possess the authority to "detain" whatsoever. Investigative stops are limited to in-jurisdiction peace officers. Mont. Code Ann. § 46-5-401(1). Indeed, when acting upon particularized suspicion, in-jurisdiction peace officers who are un-uniformed must "inform the person as promptly as possible....that the officer is a peace officer." Mont. Code Ann. § 46-5-401(3). Fiorentino, understandably, was caught-up in the heat of the moment and simply forgot the source of his authority. Although Fiorentino's decision is explicable, this Court should suppress his behavior because he exceeded his authority to arrest.

**7) As a trained peace officer, Fiorentino knew he could not arrest Iosefo for careless driving.**

Both parties' concede that an out-of-jurisdiction peace officer maintains his or her training and experience. Consequently, Fiorentino knew or should have known that he could not arrest Iosefo for mere traffic offenses. *Bauer* at ¶ 32. As a practical matter, Fiorentino detained Iosefo until an investigation by on-duty police could be performed. The private citizen arrest statute does not contemplate that citizens become investigators acting on behalf of the State. More certainty is demanded. Fiorentino was neither uniformed nor in a patrol vehicle when he was attempting to

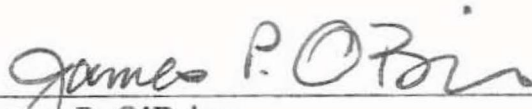


control Iosefo, so Iosefo had no obligation to obey Fiorentino's commands.<sup>2</sup> Mont. Code Ann. § 61-8-316(1).

### CONCLUSION

Fruits of Iosefo's arrest must be suppressed because Fiorentino, while moonlighting as an armed security guard, exceed his authority to arrest under Montana's private citizen arrest statute. The facts and circumstances personally known to him when he threatened to put Iosefo at gunpoint – erratic driving – gives rise to particularized suspicion, but as an out-of-jurisdiction peace officer, Fiorentino lacked probable cause to determine if a jailable crime was or had been committed. Although Fiorentino's behavior is explicable, the Court should suppress Fiorentino's invalid private citizen's arrest.<sup>3</sup>

DATED this 10<sup>th</sup> day of April, 2014.

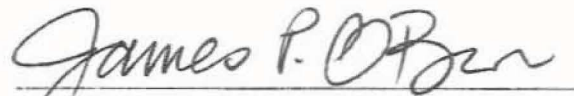
  
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<sup>2</sup> See *Brf. of App.* at p.22

<sup>3</sup> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States* (1948), 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436, 440.

### **CERTIFICATE OF COMPLIANCE**

In accordance with M. R. App. P. 11(4)(e), the undersigned certifies that the text is double spaced, except for quotations, which are singled space; the text is proportionally spaced using Times New Roman 14 point size font; and, the total word count of the text of this brief, exclusive of the Table of Contents and Table of Authorities, is less than 5,000 words.

A handwritten signature in cursive script, reading "James P. O'Brien", written over a horizontal line.

James P. O'Brien  
Attorney for the Defendant and  
Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that I have filed a true and accurate copy of the foregoing APPELLANT'S REPLY BRIEF with the Clerk of the Montana Supreme Court; and, that I have served true and accurate copies of the foregoing APPELLANT'S REPLY BRIEF upon each attorney of record.

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